BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY POWELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,062,569
SPIRIT AEROSYSTEMS, INC.	)	
Respondent	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the February 14, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Vincent Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, with the record consisting of the Preliminary Hearing Transcript of February 14, 2013, with exhibits; and the documents filed of record with the Division.

ISSUES

The ALJ found claimant suffered an injury to his right ankle which arose out of and in the course of his employment with respondent on April 13, 2012. He further determined that the accident on that date was the prevailing factor causing the injuries which are the subject of this litigation. He went on to authorize Dr. Steven Howell to be claimant's authorized treating physician with the treatment limited to claimant's right ankle, until further order, and ordered all medical to be paid as authorized.

Respondent appeals, arguing claimant's workplace incident merely aggravated his preexisting right ankle condition and is not compensable. Respondent also argues that this aggravation did not arise out of and in the course of claimant's employment with respondent on April 13, 2012, but, instead is the result of a personal or neutral risk. Finally, respondent contends the workplace incident is not the prevailing factor leading to claimant's current condition and need for medical treatment.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked for respondent since 2005. He testified that in 1994 or 1995 he had problems with his right foot and ankle and received treatment with board certified orthopedic surgeon Steven J. Howell, M.D. Claimant acknowledged having a preexisting foot deformity that required surgery to help alleviate some of his problems. Claimant periodically returned to Dr. Howell for additional treatment over the years.

Claimant first met with Dr. Howell in August, 1993, for an evaluation of his ongoing bilateral foot pain. Claimant had been diagnosed with markedly flat feet several years before. Dr. Howell initially treated claimant conservatively, with shoe inserts and work restrictions of two hours maximum standing and walking. Claimant underwent foot surgery, on December 15, 1993, consisting of a posterior tibial tendon reconstruction, flexor digitorum longus transfer, calcaneal osteotomy, right iliac crest bone graft and Achilles lengthening. Claimant also underwent a subtalar and first tarsal metatarsal joint fusion in the right foot with a right iliac crest bone graft in December 1995, again under the care of Dr. Howell. Dr. Howell remained claimant's primary care physician for his ongoing foot problems for many years, treating claimant with surgeries, heel lifts, ankle supports, arch supports, flexible and rigid casts, cam walkers, injections and night splints. It is clear, from this extensive medical record that Dr. Howell is well informed regarding claimant's long history of foot and ankle difficulties.

On June 1, 2010, claimant was examined by Dr. Howell for mild arthrosis in the front of the right ankle joint. Claimant was again treated with night splints, heel lifts and ankle supports, with possible injections if necessary. In April 2011, claimant was told that if a series of cortisone injections did not help more surgery may be necessary. The injections provided limited, temporary relief.

On April 13, 2012, as claimant and a co-worker, Michael D. Stuhlsatz, Jr., were returning from the cafeteria, claimant's foot caught on some steps and he slipped and fell. Claimant testified that he tried to avoid a box on the steps when he slipped. Mr. Stuhlsatz saw claimant's left foot drag and catch the edge of the top step. This caused claimant to

trip and take a large step down all five steps, landing on his right foot. Claimant reported the incident to his manager, John Daniels, within 30 minutes. As the day progressed, the pain increased. Claimant completed the rest of the work day and, after work, went to St. Teresa's emergency room. Claimant reported immediate pain in the right ankle and foot.

Claimant was not able to discuss the incident with respondent on April 14 because a tornado hit the plant. He did ask, via email, if he was to go to the medical department on Monday, and he was told that respondent did not want anyone at the plant due to the tornado damage. When the plant reopened, claimant followed up with the medical department at Spirit, and was sent to Dr. Howell. X-rays were taken and he was put in a walking cast.

When Dr. Howell met with claimant on May 2, 2012, he noted that claimant was in with a new problem on the lateral aspect of the right ankle. He diagnosed an inversion sprain and, from the x-rays, identified what looked like a crack through the lateral articular surface of the talus. Dr. Howell noted claimant had earlier undergone a subtalar fusion. He also identified old calcific deposits inferior to the tip of the lateral malleolus. Dr. Howell initially treated claimant conservatively with a Cam Walker, but later determined surgery was needed.

Claimant admits to having arthritis in his right ankle since the 1995 surgery. Claimant testified that his job before the accident was primarily sedentary and had him seated for six and a half to seven hours a day. The pain claimant currently has in his ankle is different from the pain he had in 2011, and is on a different side of his ankle. Claimant was wearing an ankle brace on the day of the accident. He had been wearing the brace for a year or two before the accident. The brace was prescribed by Dr. Howell.

Claimant testified that he is having problems with both of his ankles from having to compensate for the right by putting his weight on the left. He now requests treatment for both of his ankles.

Respondent doesn't deny that claimant fell, but questions the cause of the fall. Claimant admits that the box on the stairs had been there for weeks or months and he even noticed the box that morning when he came into work.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational

disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d)(e) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury
shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Respondent is correct that, with the significant modifications to the Kansas Workers Compensation Act (Act) in 2011, a claimant's entitlement to medical treatment for a work connected accident and injuries is more strictly controlled. Accidents occurring before May 15, 2011, only required that an accident aggravate or accelerate an existing condition or disease or intensify a preexisting condition to be compensable as a work-related accident.[1] However, that all changed with the 2011 modifications to the Act. The connections between the accident and resulting injuries and need for medical treatment are now more stringent.

[1] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Here, claimant has a long history of right foot and ankle problems resulting in multiple surgeries and years of medical treatment. While this would normally support respondent's position, this record contains only one medical opinion regarding claimant's condition and its relation to his prior problems. That opinion comes from claimant's long-term treating physician, Dr. Howell. In his report of May 2, 2012, Dr. Howell identified claimant's condition as an inversion sprain of the right ankle with a possible fracture of the lateral surface of the tibia. He identified this as a "new problem".[2] This new diagnosis does not appear in any of claimant's prior medical reports.

Respondent also correctly articulates the language of K.S.A. 2011 Supp. 44-508(f)(2), which provides an injury is not compensable **"solely"** because it aggravates, accelerates or exacerbates a preexisting condition. However, here claimant's diagnosis is not a preexisting condition. It is identified by Dr. Howell as a new problem.

Respondent also argues claimant's accident was not the prevailing factor causing his current condition. Instead, respondent contends it is the result of a personal or neutral risk, or an idiopathic cause. Claimant tripped or slipped on the steps of respondent's facility. He fell four to five steps, landing on his right foot/ankle. He suffered immediate pain in the right foot/ankle and reported the incident immediately. Falling down four to five steps at work is not personal, neutral nor is it idiopathic. It is a work-related incident for which claimant is entitled, and respondent is responsible, for medical treatment. The award of medical benefits by the ALJ is affirmed.

Claimant contends he is entitled to medical treatment for his left lower extremity as well, claiming overcompensation for the right foot/ankle. However, Dr. Howell expressed no opinion regarding the cause of claimant's current left lower extremity complaints. Claimant has failed to satisfy his burden of proving a connection between those complaints and his work injury on April 13, 2012.

Neither the authorization of Dr. Howell, nor the order for payment of authorized medical treatment are issues over which the Board takes jurisdiction on an appeal from a preliminary hearing order.[3] Respondent's appeal of those issues is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[2] P.H. Trans., Cl. Ex. 3 at 7.

[3] See K.S.A. 2011 Supp. 44-534a.

[4] K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident on April 13, 2012, which arose out of and in the course of his employment with respondent. That accident is the prevailing factor causing claimant's need for medical treatment to his right ankle. The Order of the ALJ dated February 14, 2013, is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated February 14, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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John D. Clark, Administrative Law Judge